In the Supreme Court of the United States

OCTOBER TERM, 1940.

No.....

RAY RITTER, *et al.*,
Petitioners,

vs.

MILK AND ICE CREAM DRIVER
AND DAIRY EMPLOYEES UNION,
Local 336, *et al.*,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT.

The opinion of the Court of Appeals for the Eighth District of Ohio is printed *in toto* in the record. The Supreme Court of Ohio rendered no opinion.

II.

STATEMENT OF THE CASE.

The facts, rulings of the courts below and questions presented are set forth in the foregoing petition, pages 1 to 15 inclusive, thereof.

III.

SPECIFICATIONS OF ERROR.

The Supreme Court of Ohio erred:

1. In dismissing petitioners' appeal as involving no debatable constitutional question.

2. In holding that it was not a violation of the 14th Amendment to the United States Constitution to create a combination by which petitioners were deprived of the means of engaging in business independently and making them ineligible to join a union unless they earned $140.00 per month as employees.

3. In holding that the rights of the petitioners to equal protection of the law under the 14th Amendment to the United States Constitution were not violated when they were excluded from the protection of the Valentine Anti-Trust Act of Ohio against an illegal combination to deprive them of their business while affording such protection to others similarly situated.

4. In so construing the Valentine Act as to make an unreasonable and arbitrary discrimination against the petitioners, by excluding them from the benefits of the Act against an illegal combination in restraint of trade formed to destroy their business.

5. In failing to find that the defendants conspired unlawfully to deprive the petitioners of their right to carry on a lawful business in violation of the 14th Amendment to the United States Constitution.

6. In failing to hold that the agreement and combination of the defendants interfered with Interstate Commerce.

7. In holding that independent business men, such as petitioners, may be made the basis of a labor dispute between employer and employee, allowing them to combine to destroy their business, if it be the result and not the primary purpose of their agreement.

8. In holding that a Union may induce or coerce an employer to cease dealing with those with whom it has no labor dispute upon the threat of strike.

9. In holding it to be "the order of the day" for small corner grocery stores, drug stores and individual business men to be annihilated by "chain stores."

SUMMARY OF ARGUMENT.

POINT I.

THE SCHEME OF ACTION BY THE LABOR UNION IN THE INSTANT CASE, OF COMBINING WITH EMPLOYERS TO CREATE A MONOPOLY, FIX PRICES, STIFLE COMPETITION, RESTRAIN TRADE AND DESTROY THE PETITIONERS' BUSINESS, IS ILLEGAL AND ENJOINABLE.

A. If the object of a combination be unlawful, even though the means employed in furtherance thereof be lawful, it may be enjoined.

B. The scheme involved an illegal boycott and should have been enjoined.

POINT II.

THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION UNDER THE 14th AMENDMENT WILL NOT PERMIT THE EXCLUSION OF THE PETITIONERS FROM PROTECTION AFFORDED BY THE PROVISIONS OF THE VALENTINE ANTI-TRUST ACT OF OHIO AGAINST ILLEGAL MONOPOLIES AND COMBINATIONS IN ILLEGAL RESTRAINT OF TRADE, WHILE GRANTING IT TO OTHERS IN SIMILAR CIRCUMSTANCES.

A. Excluding the petitioners from the benefits of the Act involves the 14th Amendment.

B. The 14th Amendment protects the constitutional guarantees from judicial impairment of State courts as fully as from impairment of other departments of State government.

POINT III.

THE SCHEME IN THE INSTANT CASE INVOLVED ILLEGAL RESTRAINT UPON INTERSTATE COMMERCE.

ARGUMENT.

POINT I.

THE SCHEME OF ACTION BY THE LABOR UNION IN THE INSTANT CASE, OF COMBINING WITH EMPLOYERS TO CREATE A MONOPOLY, FIX PRICES, STIFLE COMPETITION, RESTRAIN TRADE AND DESTROY THE PETITIONERS' BUSINESS, IS ILLEGAL AND ENJOINABLE.

With the legitimate objects of a Labor Union no one can have any quarrel. The rights of labor to organize and bargain collectively to secure higher wages, shorter hours and better working conditions, are fully recognized and protected by law. When, however, a Union undertakes to go beyond such lawful purposes and joins with others to impair a free economy, to restrain trade, fix prices, create a monopoly and destroy the business of others, it cannot avoid the legal consequences of such a combination by extolling before the courts its virtues and its noble purposes or by declaring that its intentions and primary purposes were for good and not for evil.

Duplex Printing Press Co. v. Deering, 254 U. S. 443;
U. S. v. Brims, 272 U. S. 549;
Loewe v. Lawlor, 235 U. S. 522;
Eastern States Retail Dealers Assoc. v. U. S., 234 U. S. 613.

A. If the object of a combination be unlawful, even though the means employed in furtherance thereof be lawful, it may be enjoined.

See cases above cited, and

Curran v. Galen, 152 N. Y. 33;
Bedford Cut Stone v. Stone Cutters Association, 274 U. S. 37.

The Supreme Court of Ohio took the view that the scheme was not unlawful because it was incidental to a lawful purpose, to wit: the creation of a "closed shop."

Thus was extended the closed shop principle to affect non-employes who are not eligible to union membership. In other words, if capital and labor combine to carry out the destruction of a competitive business, all they need do is to indicate that their primary purpose and intention was to create a closed shop, that the destruction of the business of non-combatants is merely incidental and the scheme has legal foundation. We submit that this places in the hands of industry a powerful means of oppression denied to governmental agencies much less to private enterprise. Constitutional guarantees could by this method become meaningless. This Court has in several instances declared against such activity. (See cases above cited.)

Such program by industry alone is clearly in violation of State Anti-Trust Laws and the Sherman Act, where Interstate Commerce is involved.

U. S. v. Trenton Potteries Co., et al., 273 U. S. 392;
Interstate Circuit v. U. S., 306 U. S. 208.

The infusion of a labor union into this scheme does not exonerate the participants, especially as in the instant case, when one of the claimed objects of the agreement relied on to add color of legality to the scheme, to wit, a "closed shop," was stated by a union officer to be unnecessary for union needs, but that it was vital to employers to carry out the purposes of the scheme. Destroying the business of petitioners and thereby assisting dairy owners to create a monopoly, fix prices and enable them to perpetuate a method of milk distribution more costly to the consumer, is not a labor union's legitimate concern.

Cases above cited, and

Local 167 I. B. T. v. U. S., 291 U. S. 293;
Scavenger Service Corp. v. Courtney, 85 Fed. (2nd) 825, 837.

"The conspiracy was one to ruin appellants; therefore the means adopted were unlawful * * * if, therefore, individuals conspired to commit the wrongful

act of ruining plaintiff's business, the means, even though of themselves innocent, were actionable. Aside from whether the picketing was peaceful, it was unlawful (*American Steel Foundries v. Tri-City Central Trades Council,* 257 U. S. 184); it was unlawful when its object was as here disclosed." *Scavenger Corp. v. Courtney,* 85 Fed. (2) 825, 837.

Since the scheme of the Defendants' Union had for its effect, as well as for its purpose, the destruction of the rights and means of others to carry on a lawful business, it cannot be justified as having been done to advance its own cause or to further its own purposes. (Cases above cited), and

U. S. v. Borden, 84 L. E. 143.

B. The scheme involved an illegal boycott.

The claim that the agreement was made because of union insistence upon the threat of strike involved the use of an illegal boycott against these petitioners and the means employed were illegal.

Duplex Printing Press v. Deering, 254 U. S. 443;
Truax v. Corrigan, 257 U. S. 312, 330;
Bedford Cut Stone v. Stone Cutters Assoc., 274 U. S. 37;
Scavenger Service Corp. v. Courtney, 85 Fed. (2nd) 825, 837.

Between the brokers and the Defendant Union there existed no labor dispute. *Crosby v. Rath,* 136 O. S. 352. The Union therefore could not insist that dairy owners henceforth cease supplying brokers with bottled milk. The owners were free to enter into an agreement with the Union regarding wages, hours and working conditions of employes, but they could not be compelled upon threat of a strike to enter into an agreement prohibiting them from selling bottled milk to brokers, grocers, druggists, or to anyone else who chose to purchase milk at the dairy and

pay for it. See cases above cited under Paragraph 1 this subdivision, and

Toledo A. A. & N. M. Ry. Co. v. Penna. Co., et al., 54 Fed. 730.

POINT II.

THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION UNDER THE 14th AMENDMENT WILL NOT PERMIT THE EXCLUSION OF THE PETITIONERS FROM PROTECTION AFFORDED BY THE PROVISIONS OF THE VALENTINE ANTI-TRUST ACT OF OHIO AGAINST ILLEGAL MONOPOLIES AND COMBINATIONS IN ILLEGAL RESTRAINT OF TRADE, WHILE GRANTING IT TO OTHERS IN SIMILAR CIRCUMSTANCES.

The petitioners claimed that by the scheme of action of respondents in the present case, they were deprived of the means of earning a livelihood in that they were prevented from buying bottled milk for resale from dairy owners in Cleveland, or from sources outside the State of Ohio, and they could not join the Union because they were ineligible to membership as "brokers." Under the provisions of the Valentine Anti-Trust Act, such an agreement is illegal as creating a monopoly and restraining trade unlawfully.

Thus, in Ohio, it has been said of such schemes:

> "There are certain transactions, however, which repeatedly and upon clear grounds have been held to be illegal. For the most part, these are contractual arrangements, having the direct purpose of fixing prices, establishing monopolies or stifling competition, or which, being merely incidental to some lawful transaction, are unreasonable in scope or materially prejudicial to public interests. No Ohio decision has upheld a transaction whose purpose was to fix prices or establish a monopoly or, with one exception, whose sole purpose was to reduce competition." 27 *O. Jur.* 170.

Admittedly, the agreement and combination in the instant case oppressed the brokers and suppressed their competition; there being 2400 Union drivers in the Union and only 300 or more independent brokers in Cleveland, the only bulwark against a fixed "card" price of milk and the complete control and domination over the marketing thereof, was this independent broker group, which had to be eliminated if a monopoly were to be created. The evidence was conclusive that the Union's purpose was not alone to obtain higher wages; one of its prime objects was to create a monopoly, fix prices and help the dairy owners in doing so. This, being clearly in violation of the provisions of G. C. O. 6390-91-93 *et seq.*, the respondents should have been enjoined and the petitioners given the benefits of the act. However, by the lower court's interpretation of the act, the petitioners were excluded and denied the benefits thereof. Such exclusion, we respectfully urge, was unreasonable, arbitrary and discriminated against these petitioners, denied them due process and deprived them of the equal protection of the laws guaranteed by the 14th Amendment to the United States Constitution.

Connolly v. The Union Sewer Pipe Co., 184 U. S. 540;
Truax v. Corrigan, 257 U. S. 312, 335;
Barbier v. Connolly, 113 U. S. 27, 31;
Liggett v. Baldridge, 278 U. S. 105, 111;
Smith v. Cahoon, 283 U. S. 553, 567.

The 14th Amendment protects the constitutional guarantees from judicial impairment of State courts, as fully as from impairment by other departments of government. The court, being an instrumentality of the State, is subject to the same scrutiny against impairing constitutional rights of individuals, as is the State itself. Its action is State action.

> "Whoever by virtue of a public position under a State Government deprives another of property, life or liberty, without due process of law, or denies or takes

away the equal protection of the laws, violates the constitutional inhibition and as he acts in the name of and for the State and is clothed with the State power, his act is that of the State. This must be so or the constitutional provision has no meaning." *Ex parte, Va.*, 100 U. S. 339, 347.

The due process clause has been construed to apply to all State action, whether legislative, executive or judicial. Judicial infringement of individual rights has been repeatedly denounced by this Court.

Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673.

This Court has determined in *Truax v. Corrigan* that a union cannot combine with employers to carry out restrictions in trade or commerce. The Ohio Supreme Court has held in the instant case that this may be done as being merely incidental to a lawful Union purpose and therefore excluded the petitioners from the benefits of the Anti-Trust Act. While the State Court can and does have final determination of what is the law of the State, it cannot make a final decision when the law so determined impairs rights guaranteed by the United States Constitution. Final determination of such rights is with this Court; otherwise, "the Constitution of the United States would be different in different states and might perhaps never have precisely the same construction, obligation or efficacy in any two states."

Martin v. Hunters Lessees, 1 Wheat. 304, 308.

And so the court said in *Barbier v. Connolly*, 113 U. S. 27, 31—

> "* * * The 14th Amendment * * * undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they

should have like access to the courts of the country for the protection of their persons and property, the preservation and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

The injury to the petitioners due to the discrimination against them is not imaginary or sentimental, but is a direct and vital violation of their constitutional rights. The admitted effect of the agreement was to prohibit the sale of milk to them for re-sale. The scheme included the prevention of a supply reaching them from outside of the State of Ohio. Union membership was closed to them as brokers. A more iron-clad and more efficient encirclement of individual entrepreneurs for the purpose of annihilating them and their means of earning a livelihood cannot be imagined. If this scheme succeeds, the brokers are finished—as Mr. Sechler stated—"You had that in the bakery industry and the ice industry, * * * you have done away with it now." (N. S. 5.)

It cannot be argued that such classification is reasonable, or that it is socially beneficial. The brokers are not pariahs or outcasts from society; they serve a distinct social purpose. While in many instances they earn less than $140.00 per month, in many instances they fare better than union drivers; they serve many persons who otherwise would find it difficult or impossible to obtain milk, such as factory workers. They supply housewives with products identical in quality as those served by advertising dairies at 2¢ less per quart, by substituting personal solicitation for advertising media, thus eliminating that cost. They stand in the way of a complete control and domination over the marketing and the price of milk by large dealers and the creation of a monopoly, there being approximately 300

brokers as against 2400 Union employes in Cleveland. Not one reason can be given for their elimination and destruction other than it would benefit the large distributors of milk and perhaps, indirectly, the Union. This is not enough, we urge, to drive 300 or more small business men out of business and deprive them of the means of earning a livelihood.

POINT III.

THE SCHEME INVOLVED ILLEGAL RESTRAINT UPON INTERSTATE COMMERCE.

Cleveland obtains its milk from producers within a radius of 100 miles of the city. It is called Cleveland's Milk Shed. This, therefore, brings Cleveland into the Western Pennsylvania milk market. During the negotiations when a Pittsburgh individual offered to open a cooperative dairy in Cleveland, employ the brokers and have them join in the Union, the Union Secretary assured the dairy owners that this could not happen because, if a dairy were opened, it could not bring milk into Cleveland.

Activities intra-state in character because of their close proximity and effect upon interstate commerce, may be considered a part thereof.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 37;

Houston, E. & W., T. R. Co. v. U. S., 234 U. S. 342, 51, 52.

The controversy here arises because of the objection to the method employed by the brokers in distributing milk, namely, that of buying at the dairy for resale to the consumer. The Union claimed it affected its drivers; the dairy owners could not maintain a card price; both agreed the broker and his method of distribution were inimical to their interests and had to be eliminated. Baxter and others of the employers group were seeking some method whereby this could be accomplished legally. The Union

sought the same thing. Both groups found the way through this contract, which admittedly forebade sales of bottled milk to the brokers by those holding contracts with the Union. This included virtually all of the dairies in Cleveland. This Court has repeatedly held that combinations and conspiracies which limit third persons against engaging freely in Interstate Commerce or compel them to conduct such commerce only in a certain way involuntarily, create a burden upon Interstate Commerce.

Local 167, I. B. T. v. U. S., 291 U. S. 37;
Duplex Printing Press v. Deering, 254 U. S. 443;
Bedford Cut Stone v. The Stone Cutters Assoc., 274 U. S. 37;
Loewe v. Lawlor, 208 U. S. 274.

When necessary, this Court will enjoin purely local acts in order thereby to protect Interstate Commerce from unlawful restraints. (See cases in paragraph above cited.)

A scheme arranged to deprive local business men of bottled milk for re-sale by prohibiting dairy owners who obtain such milk from producers within a radius extending beyond the boundaries of the State, which includes restraining, hindering or preventing such supply from reaching them from sources outside the State, is, we submit, a burden on Interstate Commerce which we have heretofore shown may be enjoined.

CONCLUSION.

For the reason stated and on the authority of the cases cited, it is respectfully submitted that this petition should be granted.

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